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Mt. Healthy and Causation in Fact: The Court Still Doesn't Get It!

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Mt. Healthy and Causation-in-Fact: The Court Still Doesn't Get It!

by Sheldon Nahmod*

I. INTRODUCTION

Over fifteen years ago, I argued in a prior edition of my section 1983 treatise that the second burden-shift part of the *Mt. Healthy*[1] test, articulated by the Supreme Court in 1977, should go only to damages and not to liability.[2] I also argued that this causation-in-fact rule should not be limited to *Mt. Healthy*-type First Amendment employment cases, but should apply to constitutional damages actions generally and equal protection cases in particular.[3] I remain convinced that both aspects of this position are normatively sound, even if no longer good law, in light of the Court's end-of-the-millennium decision in *Texas v. Lesage*.[4] My position is supported by the following: (1) the Court's 1978 procedural due process decision in *Carey v. Piphus*;[5] (2) the Court's 1995 after-acquired evidence decision in *McKennon v. Nashville Banner*

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1. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).
2. SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 4.02 (2d ed. 1986) (currently in its fourth edition).
3. *Id.*
4. 120 S. Ct. 467 (1999) (per curiam).
5. 435 U.S. 247 (1978).

Publishing Co.;[6] (3) causation-in-fact principles from tort law; and (4) the compensation and deterrence policies underlying section 1983.[7]

II. *MT. HEALTHY* AND FIRST AMENDMENT VIOLATIONS

Mt. Healthy dealt with a section 1983 action for reinstatement and back pay arising out of a school board's refusal to renew an untenured school teacher's contract. Plaintiff claimed that his contract was not renewed because of protected First Amendment activity, while the school board asserted that it was not renewed because of plaintiff's obvious lack of professionalism. The Sixth Circuit affirmed the district court's ruling that plaintiff was entitled to reinstatement and back pay because his contract was not renewed as a result of protected First Amendment activity. Significantly, the district court also found that there was independent reason, apart from plaintiff's First Amendment activity, not to renew his contract.[8]

Vacating and remanding the district court's order of reinstatement and back pay, the Supreme Court set out the following test to be applied on remand:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct.[9]

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6. 513 U.S. 352 (1995).

7. This statute reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (Supp. III 1997).

8. 429 U.S. at 281-85.

9. *Id.* at 287 (footnote omitted).

The Court reasoned that "[a] rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[10] It concluded, "The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."[11]

Thus, in cases in which there may be mixed motives for an employment decision, one motive allegedly violative of the First Amendment and the other motive permissible, there are two burdens under *Mt. Healthy*. The first is the plaintiff's: Did the plaintiff prove by a preponderance of the evidence that the impermissible motive was a substantial factor in the challenged decision? If the answer is no, then the plaintiff has lost on the First Amendment violation issue and there is obviously no need to address the remedy issue. If the answer is yes, then the burden-shift inquiry kicks in: Did the defendant prove by a preponderance of the evidence that it would have made the same decision anyway (i.e., did the defendant prove the absence of but-for causation)? If the answer to the burden-shift inquiry is no, then the plaintiff is entitled to reinstatement and back pay and any other damages attributable to the job loss because the First Amendment violation caused the job loss.

However, if the answer to the burden-shift inquiry is yes, then the plaintiff is not entitled to reinstatement and back pay because the First Amendment violation did not cause the job loss. Nevertheless, and here is the major point, I argue that there is a First Amendment violation in this situation and that the plaintiff should be entitled to whatever compensatory damages that he can prove are attributable to the First Amendment violation itself, excluding any damages attributable to the job loss.[12] For example, there may be emotional distress resulting from the chilling effect upon the plaintiff for being punished for past First

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10. *Id.* at 285.

11. *Id.* at 285-86.

12. I emphasize that such damages are neither presumed damages, *Carey*, 435 U.S. at 259-64, nor damages for the "intrinsic value" of First Amendment rights, Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 308-10 (1986), neither of which is permitted under section 1983. However, I have argued elsewhere that presumed damages should be recoverable for First Amendment violations. *See* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 4:4 (4th ed. 1997) [hereinafter NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION].

Amendment activity and from the frustration of the denial of the plaintiff's right of self-expression.[13]

Admittedly, this may be very difficult for a plaintiff to prove in the typical First Amendment employment case. But even when the plaintiff cannot prove any compensable emotional distress, the plaintiff should be entitled at least to nominal damages to vindicate the constitutional interest harmed. Perhaps the plaintiff should also be entitled to attorney fees as a prevailing party[14] when the defendant is a local government[15] or an individual not protected by absolute or qualified immunity.[16] Indeed, without the possibility of recovering damages for First Amendment harm caused (again, apart from the job loss), the plaintiff is actually placed in a "worse . . . position than if he had not engaged in the conduct" because he is denied compensation for harm caused.[17] The Court's emphasis in *Mt. Healthy* that the mixed-motive

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13. Damages for emotional distress (general damages) are recoverable under section 1983, even when there are no lost wages or other special damages. *Cf. Carey*, 435 U.S. at 263-64 (rejecting an argument for presumed damages for procedural due process violations and explaining, "[W]e foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff."). For a full discussion of *Carey*, see *infra* Part IV.

14. "In any action or proceeding to enforce [section 1983 and other civil rights statutes] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b) (Supp. III 1997). However, when a plaintiff recovers only nominal damages after unsuccessfully seeking substantially more, the Court has ruled that any award of attorney fees must take into account this almost total lack of success and may even be eliminated altogether. *See* Farrar v. Hobby, 506 U.S. 103, 114-15 (1992).

15. Local governments can be held liable for compensatory damages under section 1983 for constitutional violations brought about through their official policies or customs. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 690-91 (1978). This is a very complicated and often arcane subject. *See* 1 NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 12, § 6:1 to :71.

16. Primarily for instrumental reasons, certain individuals—typically legislators, judges, and prosecutors—who are sued under section 1983 for their constitutional violations are often protected from damages liability by absolute immunity when they have acted legislatively, judicially, or in an advocative capacity. *See* 2 NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 12, § 7:1 to :65.

Also primarily for instrumental reasons, government officials who are sued under section 1983 for their constitutional violations, but who are not protected by absolute immunity may be protected by qualified immunity if they prove that a reasonable official could have believed in the constitutional validity of the challenged conduct at the time it occurred in light of pre-existing law. The qualified immunity standard is thus one of objective reasonableness. *See* 2 NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 12, § 8:1 to :99.

17. *Mt. Healthy*, 429 U.S. at 286.

plaintiff is entitled to *no more* than the restoration of the status quo ante suggests that the plaintiff should be entitled to *no less* than that.

Admittedly, the Court in *Mt. Healthy* focused on reinstatement and back pay. Thus, strictly speaking, *Mt. Healthy* did not address causation-in-fact in a damages setting. Still, my prior understanding of *Mt. Healthy* and the effect of the burden-shift rule was not necessarily inconsistent with the Court's language in the case. The above-quoted language mentions "[t]he constitutional principle at stake," thus suggesting that there was indeed a constitutional violation in *Mt. Healthy*.[18] Also, in *Mt. Healthy* the remedy at issue was not damages but rather the equitable remedy of reinstatement and back pay, each aspect of which is connected to the loss of employment itself. That is, the Court did not necessarily hold that a person in the *Mt. Healthy* plaintiff's situation is precluded from recovering damages not attributable to loss of employment. Instead, its focus was on the loss of employment and fairness to the employer.

On the other hand, other parts of the opinion can be read very differently. For example, several sentences before the Court's reference to "[t]he constitutional principle at stake," the Court described the issue before it as whether, when an employer would have reached the same decision even apart from the impermissible motive, "the fact that the protected conduct played a 'substantial part' in the actual decision not to renew would necessarily amount to *a constitutional violation justifying remedial action*."[19] This can be understood as indicating that a defendant who carries *Mt. Healthy*'s shifted burden has prevailed on the merits of the constitutional violation itself.

All this demonstrates that exegesis is better reserved for sacred texts than for Supreme Court decisions.[20] For present purposes it suffices that reading the burden-shift rule of *Mt. Healthy* as going to remedy and not to liability was at least plausible and not necessarily inconsistent with the position that this burden shift *should* go to remedy. On the other hand, after *Mt. Healthy* most of the circuit courts addressing the issue understood *Mt. Healthy*'s burden-shift rule as going to liability and not to remedy.[21] Moreover, a majority of the justices, including Justice

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18. *Id.* at 285.

19. *Id.* (emphasis added).

20. *Mt. Heathy*'s ambiguity on the burden shift may well have been intentional so as to allow it to be interpreted subsequently as going to liability. Indeed, this turned out to be the case. *See Lesage*, 120 S. Ct. at 468. For further discussion of *Lesage*, see *infra* Parts III, VIII.

21. *See* 1 NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 12, § 4:10, at 4-34 n.13.

Brennan, appeared to read *Mt. Healthy* the same way in *Price Waterhouse v. Hopkins*.[22] Finally, in November 1999 the Court in *Lesage*, which was a unanimous per curiam decision without benefit of briefs and argument, declared that *Mt. Healthy*'s burden-shift rule goes to liability in *all* section 1983 damages actions based on First Amendment and Equal Protection Clause violations.[23]

III. *TEXAS V. LESAGE*: A FIRST LOOK

Lesage involved section 1981, section 1983, and Title VI claims for damages and injunctive relief brought by a white African immigrant against the University of Texas and others for allegedly rejecting, on racial grounds, his application for admission to the school's Ph.D. program in counseling psychology. He argued that the school's race-

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22. 490 U.S. 228 (1989). In this case, a plurality of the Court, in an opinion by Justice Brennan, interpreted the "because of" language in Title VII of the Civil Rights Act of 1964 as follows:

> [O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights.

Id. at 244-45 (footnote omitted). In addition, Justice Brennan ruled that the defendant could carry its burden by a preponderance of the evidence; clear and convincing evidence was not required. *Id.* at 252-53. Justice White concurred in the judgment, disagreeing with the part of Justice Brennan's plurality opinion that suggested that the defendant had to carry its burden by objective evidence. *Id.* at 261 (White, J., concurring in the judgment). Justice O'Connor also concurred in the judgment and emphasized that the burden-shift rule went to liability. *Id.* at 261 (O'Connor, J., concurring in the judgment). Arguing that the plaintiff in a Title VII case has the burden of proving that the impermissible motive was a but-for cause of the challenged employment decision, Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, dissented. *Id.* at 281 (Kennedy, J., dissenting).

Justice Brennan's plurality opinion in *Price Waterhouse* referred several times to *Mt. Healthy* in the course of arguing that the burden-shift rule was not an unfamiliar one in mixed-motive employment cases. This might suggest that *Mt. Healthy*'s burden-shift rule goes to liability just as *Price Waterhouse*'s burden-shift rule does. However, unlike Justice White, Justice Brennan did not explicitly declare that the burden shift in *Mt. Healthy* goes to liability. Moreover, the plurality's emphasis on Title VII's language can serve to distinguish *Price Waterhouse* from *Mt. Healthy* because the latter case was a constitutional damages action. Finally, it may well be that Justice Brennan was constrained to hold that the burden-shift rule in *Price Waterhouse* goes to liability because that was the price of getting a fifth Justice to go along with the holding that the plaintiff's burden in a Title VII case is to prove that gender was a motive—that is, a substantial factor—in the adverse employment action and that the plaintiff does *not* have to prove but-for causation, despite the position of the dissent.

23. 120 S. Ct. at 468.

conscious admissions program violated his federal constitutional and statutory rights. Granting defendants' motion for summary judgment on all claims, the district court concluded that consideration of race did not affect plaintiff's rejection.[24] The Fifth Circuit reversed, stating that even if the school would have rejected plaintiff under a colorblind admissions process, that was "irrelevant to the pertinent issue on summary judgment, namely, whether the state violated Lesage's constitutional rights by rejecting his application in the course of operating a racially discriminatory admissions program."[25] It went on to observe that if plaintiff was rejected at any racially conscious stage of the admissions process, then he had "suffered an implied injury"—the inability to compete on equal footing with other applicants.[26] Because there was a factual dispute as to this, summary judgment for defendants was inappropriate.[27]

The Supreme Court in turn unanimously reversed in a per curiam opinion.[28] As to the section 1983 damages claim, the Court expressly ruled that, under the approach of *Mt. Healthy*, even if defendants actually considered the impermissible criterion of race in rejecting plaintiff, they would "defeat liability" if they could prove that plaintiff would still have been rejected under a race-neutral policy.[29] It acknowledged that *Mt. Healthy*, unlike *Lesage*, involved protected First Amendment activity, "but that distinction is immaterial. The underlying principle is the same . . . ."[30] The Court concluded, "Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under § 1983."[31]

Interestingly, the Court distinguished between plaintiff's section 1983 claim for damages, which it described as backward-looking, and his section 1983 claim for injunctive relief, which it described as forward-looking.[32] As to the latter, "a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is 'the inability to compete

24. *Id.* at 467-68.
25. Lesage v. Texas, 158 F.3d 213, 222 (5th Cir. 1998).
26. *Id.*
27. *Id.*
28. 120 S. Ct. at 469.
29. *Id.* at 468.
30. *Id.*
31. *Id.*
32. *Id.* at 469.

on an equal footing.'"[33] According to the Court, however, in *Lesage* it was not clear whether plaintiff had abandoned the claim that the school was currently operating a race-conscious admissions process.[34] Hence, this issue, together with the section 1981 and Title VI statutory claims, would need to be addressed on remand.[35]

As noted, the Court decided *Lesage* without briefs or oral argument, thereby clearly indicating that the Court considered the *Mt. Healthy* burden-shift issue to be well settled for both First Amendment and Equal Protection Clause damages claims brought under section 1983. And so it now is after *Lesage*. But why was there no injury because of "'the inability to compete on an equal footing'" in connection with the *Lesage* plaintiff's backward-looking section 1983 damages action?[36] After all, the opportunity to compete for admission to the Ph.D. program is different from being denied admission. Hence, the damages that may be attributable to the injury to the ability to compete on an equal footing on the one hand, and to the injury resulting from denial of admission on the other, are different as well. In addition, injury to the ability to compete on an equal footing, when accompanied by a racial stigma as it may have been in *Lesage*, may give rise to emotional distress damages separate from those damages attributable to denial of admission. This is also generally true for section 1983 racial discrimination and other equal protection cases in which the defendant carries the *Mt. Healthy* burden shift. The injury is to the interest in not having race used as a factor in employment decisions, even if it turns out that the decision would have been the same anyway.[37]

Lesage will be revisited at the end of this Article. For now I want to turn to the arguments that support the position that *Mt. Healthy*'s burden-shift rule should go to remedy and not to liability.

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33. *Id.* at 468 (quoting Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993)).

34. *Id.* at 469.

35. *Id.*

36. *Id.* at 468 (quoting *Northeastern Fla. Chapter of the Associated Gen. Contractors*, 508 U.S. at 666).

37. The injury to this interest, which is, at least in part, expressive in nature, is analogous to the injury alleged in racial districting cases in which a majority-minority district is created predominantly for the purpose of enhancing the voting power of blacks as a group. *See* Shaw v. Reno, 509 U.S. 630, 647-48 (1993) (asserting that, even though no individual voter's right was denied or diluted, such districting causes injury to voters by both reinforcing racial stereotypes and undermining representative government by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole).

IV. *CAREY V. PIPHUS* AND PROCEDURAL DUE PROCESS VIOLATIONS

Before *Lesage* the argument that *Mt. Healthy*'s burden-shift should go to remedy and not to liability derived considerable support from *Carey*, which the Court decided one year after *Mt. Healthy*. In that section 1983 damages case, which involved student suspensions from school without an adjudicatory hearing, the Court was concerned primarily with the damages recoverable for procedural due process violations and whether such damages could be presumed. Ultimately, the Court ruled that presumed damages are not recoverable for procedural due process violations and that plaintiffs had to prove actual damages, which could include general damages for mental and emotional distress.[38] However, more important for present purposes, the Court addressed the question of the damages that the students could recover if it subsequently turned out that their suspensions were justified.[39] It stated:

> Even if respondents' suspensions were justified, and even if they did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process. "It is enough to invoke the procedural safeguards of the Fourteenth Amendment that a significant property interest is at stake, whatever the ultimate outcome of a hearing . . . ."
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> Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury. We therefore hold that if, upon remand, the District Court determines that respondents' suspensions were justified, respondents nevertheless will be entitled to recover nominal damages not to exceed one dollar from petitioners.[40]

What the Court said about procedural due process violations should apply with at least as much force to First Amendment violations in the employment setting. There is certainly no gainsaying the importance of the First Amendment in our constitutional system. Indeed, self-

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38. 435 U.S. at 264.

39. *Id.* at 266.

40. *Id.* at 266-67 (quoting Fuentes v. Shevin, 407 U.S. 67, 87 (1972)) (citations and footnotes omitted). The Court's only reference to *Mt. Healthy* was in connection with its observation that if the suspensions were justified, then "an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation, to [the students]." *Id.* at 260.

government is considered by many to be a—perhaps the—major function of the First Amendment.[41] In addition, once an adverse governmental employment decision is tainted by an impermissible First Amendment motivation, this should constitute a First Amendment violation that caused harm, even apart from the job loss, possibly consisting of emotional distress stemming from the insult to the plaintiff. Such harm can be present even when the defendant carries *Mt. Healthy*'s burden-shift because in both procedural due process and First Amendment violation cases, the construction of a but-for hypothetical to determine causation is just that—hypothetical and counterfactual. In real-world causal terms, these are not abstract constitutional violations "in the air." The challenged decision in *Carey*, the procedural due process case, was in fact made in the absence of a hearing, and the employment decision in *Mt. Healthy*, the First Amendment case, was similarly made, in part because of an impermissible First Amendment motivation. In short, constitutional violations and resulting harm have occurred in both situations, justifying at least an award of nominal damages and the chance to prove general damages.[42]

V. *MCKENNON V. NASHVILLE BANNER PUBLISHING CO.* AND AFTER-ACQUIRED EVIDENCE

The argument that *Mt. Healthy*'s burden-shift should go to remedy and not to liability is also supported in principle by the Court's 1995 decision in *McKennon* regarding after-acquired evidence. In that case, the Court unanimously held that an employee discharged in violation of the Age Discrimination in Employment Act ("ADEA") is *not* "barred from all relief when, after her discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the employee's termination on lawful and legitimate grounds."[43] It emphasized that "[t]he employee's wrongdoing must be taken into account . . . lest the employer's legitimate concerns be ignored."[44] It also observed that as a general matter in such cases, when the employer proves that the employee would have been discharged on those grounds alone had they

41. *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

42. The argument here regarding the First Amendment should apply equally to racially discriminatory employment actions violative of the Equal Protection Clause. *See supra* Part III.

43. 513 U.S. at 354.

44. *Id.* at 361.

been discovered, neither reinstatement nor front pay is appropriate.[45] According to the Court, however, back pay can be awarded, but is limited to "the calculation of backpay from the date of the unlawful discharge to the date the new information was discovered."[46] The Court commented that this approach promotes the purposes of the ADEA while at the same time not requiring employers to ignore employee wrongdoing.[47]

Although *McKennon* did not involve two simultaneous mixed motives as did *Mt. Healthy* and *Lesage*, *McKennon* is still instructive because it did, after all, deal with two motives—one impermissible, the other not—either of which independently could have caused the employee's discharge and both of which were the employer's.[48] Given the temporal sequence in *McKennon*, with the impermissible motive coming first, the Court could not have realistically found that the impermissible motive was not a substantial factor—indeed, it was the sole factor—in causing the employee's discharge. Instead, it had to focus on the scope of the remedy, limit damages (the back pay award), and preclude reinstatement and front pay. In so doing, the Court correctly balanced fairness to the employer and the purposes of the ADEA, which would have been undermined if the Court had promulgated a no-damages liability rule.

Precisely the same should hold true in a mixed-motive case in which the employer carries the *Mt. Healthy* burden-shift. Reinstatement, back pay, and other damages for the job loss are inappropriate because of fairness concerns for the employer. However, a refusal to allow the employee to prove actual damages (apart from the job loss) attributable to the First Amendment violation undermines the purposes of the First Amendment in the employment setting.

VI. THE BACKGROUND OF TORT LIABILITY

It is by now commonplace to observe that section 1983 is to be interpreted against a background of tort liability. This phrase was first used in the section 1983 context in the seminal 1961 decision of *Monroe v. Pape*[49] as support for the Court's holding that specific intent is not

45. *Id.* at 361-62.
46. *Id.* at 362.
47. *Id.*
48. That is, had the employer known of the evidence of wrongdoing earlier, it would have discharged the employee at that time. Note that this is as much a hypothetical construction as the one required by the second part of *Mt. Healthy*, which requires the factfinder to suppose, counterfactually, that the employer had only one motive, a permissible one.
49. 365 U.S. 167 (1961).

required to prove the prima facie elements of a section 1983 cause of action.[50] Since that time the Court has also regularly insisted that section 1983 immunity doctrines be developed against this common-law tort background.[51] I have long argued that tort principles should not determine the scope of section 1983 liability, but should be adopted only when they promote the compensation and deterrence functions of section 1983.[52] Consistent with that position, I contend that established common-law tort principles of joint causation are the appropriate causation principles for use in section 1983 mixed-motive cases like *Mt. Healthy* and *Lesage*. Furthermore, under these principles a defendant who carries the *Mt. Healthy* burden shift should prevail only with respect to the scope of the remedy, not on liability.

The Restatement (Second) of Torts declares that an "actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm."[53] It is part (a) that is directly relevant to causation-in-fact, which section 432 of the Restatement goes on to explicate.[54] The general rule is that an actor's conduct is not a substantial factor in causing another harm "if the harm would have been sustained even if the actor had not been negligent."[55] However, there is a crucial exception in the following situation: "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about."[56] Furthermore, the comment to section 432(2) explains that the rule applies "not only when the

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50. *Id.* at 187. This approach actually predated *Monroe* by a decade. *See* Tenney v. Brandhove, 341 U.S. 367, 376-78 (1951) (relying on the common-law background of absolute legislative immunity as support for holding that state legislators are absolutely immune from damages liability under section 1983 for their core legislative conduct).

51. *See* 2 NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION, *supra* note 12, §§ 7:1 to 8:99 (collecting and analyzing every Supreme Court decision regarding absolute and qualified immunity under section 1983).

52. *See* Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997 (1990); Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989); Sheldon Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1 (1982); Sheldon H. Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5 (1974).

53. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

54. In contrast, section 431(b) is relevant to the proximate cause inquiry, the rules of which are set out in sections 435-461.

55. RESTATEMENT (SECOND) OF TORTS § 432(1).

56. *Id.* § 432(2).

second force which is operating simultaneously with the force set in motion by the defendant's negligence is generated by the negligent conduct of a third person, but also when it is generated by an innocent act of a third person or when its origin is unknown."[57]

The major reason for the section 432(2) exception is that there is a serious flaw in the conventional but-for test for causation. If the but-for test is applied to each of two independent forces, then the result is that neither of the forces was a cause of the harm; yet, because the harm did in fact occur, this result makes no sense. This flaw typically appears in joint causation cases and explains why the Restatement (Second) of Torts, following the lead of many courts, abandons the but-for cause-in-fact test in such situations and replaces it with the substantial factor test.

The *Mt. Healthy* mixed motive kind of case is just such a joint causation case. One force is the impermissible motivation, and the other force is the permissible motivation, both of which contributed causally to the resulting harm. If the defendant does not surmount the *Mt. Healthy* burden-shift, then the defendant is liable for all damages, including those resulting from the job loss. However, if the defendant does carry this burden, then he has demonstrated that he is not responsible for the job loss caused by the impermissible motive. Nevertheless, he should still be responsible for any emotional distress caused by the impermissible motive because that motive was a substantial factor in bringing about that distress. If the plaintiff cannot prove any emotional distress, then the plaintiff should at least be entitled to nominal damages, as is the case for procedural due process violations after *Carey*.

The contrary position—that the *Mt. Healthy* burden-shift goes to liability and not to damages—inappropriately conflates causation-in-fact and policy considerations related to liability.[58] Because there are damages resulting from the impermissible motive, and hence, from the constitutional violation, even when a defendant carries the *Mt. Healthy* burden-shift, precluding liability in such cases reflects a hidden policy decision that the plaintiff is not entitled to recover anything because of concerns with the possible adverse effect on the public employer-employee relationship and perhaps even on federalism.[59] Whatever the policy concerns, though, they do not belong in the *Mt. Healthy* causation-

57. *Id.* § 432(2) cmt. d.

58. This erroneous conflation is avoided for the most part by the Restatement (Second) of Torts.

59. *Mt. Healthy*, as interpreted by *Lesage*, is best understood as either a hidden standing case or, more likely, a hidden damages case. *See infra* Part VIII.

in-fact picture. To consider them in that connection distorts that inquiry, an inquiry that should be relatively straightforward in nature. Rather, these concerns should be addressed in the context of local government liability and individual immunities.

VII. SECTION 1983 POLICY

The crucial distinction between liability and damages in mixed-motive First Amendment and Equal Protection Clause cases like *Mt. Healthy* and *Lesage*, and in procedural due process cases like *Carey*, not only finds support in common-law causation principles, but also promotes the compensation and deterrent functions of section 1983. To the extent that other interests, such as a concern with overdeterrence and federalism, may be furthered by reading *Mt. Healthy* as going to liability rather than damages, those interests should be forthrightly addressed in the absolute and qualified immunity doctrines of section 1983 and not embedded in the causation inquiry.

The compensation function[60] of section 1983, given so much emphasis in *Carey*, is surely promoted by a rule that requires a defendant who surmounts the *Mt. Healthy* burden shift in a mixed-motive case to compensate for the harm caused by his impermissible motive, even though that compensation does not include job loss. As mentioned earlier, the plaintiff may still have suffered emotional distress apart from the job loss, and it is appropriate to compensate the plaintiff for that harm. The deterrence function[61] of section 1983 is also thereby promoted by this rule. We do not want government employers to act on the basis of an impermissible First Amendment motive. The prospect of liability will, and should, cause government employers to hesitate before

60. The basic purpose of section 1983 liability is "to compensate persons for injuries caused by the deprivation of constitutional rights .... Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Carey*, 435 U.S. at 254.

61. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights–to protect the people from unconstitutional action under color of state law ...." Mitchum v. Foster, 407 U.S. 225, 242 (1972). The deterrence function is also promoted by the availability of punitive damages awards against individuals in certain circumstances. *See* Smith v. Wade, 461 U.S. 30, 51 (1983) (adopting a standard of reckless or callous disregard of, or indifference to, the rights or safety of others). However, punitive damages are not available against local governments. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

acting on an impermissible motive. It will also reduce the likelihood of using the permissible motive as a cover for the impermissible one.[62]

VIII. *TEXAS V. LESAGE*: A SECOND LOOK

If my position is normatively sound, how are *Lesage* and *Mt. Healthy* explained? One possibility is that these are disguised standing cases: Once a defendant carries the burden-shift, perhaps the plaintiff has suffered no injury in fact and thus has no standing under Article III.[63] But this is not persuasive because the plaintiff has in fact suffered an injury: He or she has lost a job. Perhaps, then, a defendant who has prevailed on the *Mt. Healthy* burden-shift has thereby demonstrated that the plaintiff does not have Article III standing for a different reason: The plaintiff cannot fairly trace his job loss to the defendant.[64] But this is similarly unconvincing because, even in such a case, the racial motive was a substantial factor in causing the job loss, even if it was not a but-for cause. It is also telling that reading *Lesage* and *Mt. Healthy* as standing cases is inconsistent with the Court's descriptions of what it is doing. The Court has never even hinted that *Mt. Healthy*'s burden shift raises standing issues.

A second possible explanation of *Mt. Healthy* and *Lesage* may be a bit closer to the mark: They are disguised damages cases. The Court may be saying that the plaintiffs in these cases are really making presumed damages claims and that presumed damages are, according to *Carey*, unavailable in section 1983 cases. That could explain the Court's rejection of the Fifth Circuit's rationale that the plaintiff in *Lesage*

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62. My position on *Mt. Healthy* is consistent with Ernest Weinrib's view that corrective justice requires both causation and wrongdoing for noninstrumental compensatory damages. *See* Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987). Building on that view, I have argued that wrongdoing is inherent in unconstitutional conduct (such as that in a *Mt. Healthy* mixed-motive case) and that compensatory damages are normatively justified for all foreseeable harm resulting from unconstitutional conduct. *See* Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997 (1990) (disagreeing with John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461 (1989)).

63. The Court has described actual or threatened injury in fact as an irreducible minimum requirement for Article III standing. *See* Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982).

64. This aspect of Article III standing is occasionally referred to as the "fairly traceable" requirement, and it is closely related to, but still analytically different from, the third aspect of Article III standing, which is the requirement that the plaintiff's alleged injury is "likely to be redressed by a favorable decision." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976).

suffered "'an implied injury.'"[65] Or it might be saying that even if, in the rare case, there might be some modest damages attributable to these mixed-motive government decisions, these damages are de minimis and, thus, scarce judicial resources should not be further expended once a defendant has carried the burden shift. Moreover, to expend scarce judicial resources in such modest damages cases would trivialize constitutional rights and perhaps adversely affect important federalism interests.

Significantly, these suggested damages explanations are not constitutionally based but are matters of section 1983 statutory interpretation. Thus, they could theoretically be changed by Congress just as the Court's interpretation of Title VII burden-shifting in *Price Waterhouse* was changed by Congress.[66] Nevertheless, because these explanations have relatively little to do with causation-in-fact, the Court should have confronted the damages issues directly and not buried them in the causation-in-fact inquiry of *Mt. Healthy*.

IX. CONCLUSION

The Court will eventually have to distinguish *Carey*'s holding that the burden-shift goes to remedy and not to liability in procedural due process cases from *Lesage*'s contrary holding that the same burden shift goes to liability and not to remedy in First Amendment and Equal Protection Clause cases. Making this distinction will, in my view, require the Court to address a difficult question involving the nature of constitutional harm: When a defendant carries the burden-shift, why is there a procedural due process violation but no First Amendment or Equal Protection Clause violation? I reject this distinction and maintain that there is constitutional harm in all three cases. My position is consistent with the background of tort liability and promotes the compensation and deterrent functions of section 1983.

Thus, *Mt. Healthy*'s burden-shift rule should go to remedy and not to liability in *all* section 1983 cases. *Lesage* is unsound, even though it is now clearly the law that the burden-shift does indeed go to liability in First Amendment and Equal Protection Clause cases under section 1983.

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65. 120 S. Ct. at 468 (quoting *Lesage*, 158 F.3d at 222). This has some basis in the following statement in the Fifth Circuit's opinion: "[E]ven though the district court may have correctly predicted that Lesage suffered no direct injury and therefore incurred no compensatory damages, this scenario does not foreclose the availability of some other relief to which he may be entitled." 158 F.3d at 222. It is not clear what "other relief" the Fifth Circuit had in mind, but it might be presumed or nominal damages.

66. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (1994)).

That *Lesage* is a unanimous, per curiam decision signals that there was little doubt among the Justices about the nature of *Mt. Healthy*, but that does not make *Lesage* right.

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